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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194974
Party	Plaintiff Promark Brands Inc. and H.J. Heinz Company
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PROMARK BRANDS INC., and H. J. HEINZ COMPANY,	**Opposition Nos. 91194974 and 91196358 (consolidated)**
Opposers,	U.S. Trademark Application 77/864,305 For the Mark **SMART BALANCE** Published in the Official Gazette on April 20, 2010
vs.	
GFA BRANDS, INC.,	
Applicant.	U.S. Trademark Application 77/864,268 For the Mark **SMART BALANCE** Published in the Official Gazette on August 10, 2010

OPPOSERS' REPLY TO APPLICANT'S OPPOSITION TO MOTION TO STRIKE PHILIP JOHNSON'S EXPERT REPORT ENTITLED. "A STUDY OF LIKELIHOOD OF CONFUSION"

Applicant attempts to get the result it wants by misconstruing the procedural posture of this consolidated opposition and Opposers' Motion to Strike in an effort to force Opposers to needlessly spend resources in an effort to drive up the costs of this proceeding, even though Applicant has flouted the rules of the Board and misrepresented itself. Opposers' Motion to Strike is both procedurally proper and advisable on the merits, given the situation that Applicant has created. Pursuant to TBMP § 502.02, Opposers hereby file the following reply to address the issues raised by Applicant.

Unlike the cases cited by Applicant, in this matter, Opposers received a report from Mr. Johnson during the discovery period. That report was permitted by the Interlocutory Attorney, despite being untimely under the original schedule, based upon certain representations made by Applicant as to the content of that report being rebuttal, and not case-in-chief, evidence. *See* March 16, 2012 Order, at 3. As feared and despite representations to the contrary, Opposers have used the opportunity to generate a "catch-up" report and submit a survey that is not rebuttal,

but rather, case-in-chief evidence. Indeed, even the Board rules referenced by Applicant do not address a situation where a misrepresentation to the Board should result in striking a report, or where a party seeks to strike a report based on procedural issues that, if not corrected, will result in incurring great expense. Those factors make this motion timely and different than the cases and rules cited by Applicant.

Indeed, despite Opposers' adherence to the Board's procedural rules, Applicant would have Opposers placed in the unenviable position of being forced to expend great resources to depose Mr. Johnson and/or prepare a rebuttal report to a purported rebuttal report, even though the Johnson "rebuttal" report, in its entirety and without delving into the substance, is wholly improper and does not constitute rebuttal evidence. In order to avoid unnecessary waste in Board proceedings, Opposers filed a Motion to Strike a mere four business days after receipt of the Johnson report in an effort to achieve resolution before any further resources are needlessly wasted. The Board has discretion to hear this Motion at this time, and Opposers urge it do so.

None of the cases cited by Applicant deals with this precise procedural situation. For instance, *Bridgestone Fire North American Tire v. Federal Corporation*, Opp. No. 91168556, at 2 (TTAB 2010) (attached as Exhibit 1 to Applicant's Opposition) involves conducting a rebuttal survey by opposers during their rebuttal testimony period, and introducing the results through a rebuttal testimony deposition. That is an entirely different procedural situation than what is presented here, when the discovery period is still open. In the referenced cancellation proceeding captioned *M-Tek Inc. v. CVP Systems, Inc.*, 17 USPQ2d 1070, 1071-72 (TTAB 1990), the Board decided not to grant a Motion to Strike certain documentary exhibits until after final briefing. However, the Board did grant the Motion to Strike, in part, as it pertained to deposition testimony where during the initial testimony period, the petitioner obtained an order to take

certain depositions, and then violated that order by also taking the deposition of a party who had not previously been noticed and was not part of the Board's order. In that instance, the Board struck the deposition testimony, even though final briefing was not complete, in order to address the procedural violation where the Board's order had been violated. To have held otherwise would have resulted in the opposing party incurring needless expenses. In *Greenhouse Systems Inc. v. Carson*, 37 USPQ2d 1748, 1750 (TTAB 1995), a blanket motion *in limine* was denied when it sought to vaguely exclude "any evidence which might be presented by opposer at trial (or, presumably, in connection with a summary judgment motion or response), to the extent that such evidence is inconsistent with opposer's discovery responses, or consists of material oppose refused to provide during discovery due to relevancy or other objections, or consists of material oppose failed to produce in discovery on the ground that it was non-existent or unavailable." Obviously, such a blanket request is not the subject of Opposers' Motion to Strike, which is narrowly drawn to striking the non-rebuttal expert report submitted months after the true Kaplan rebuttal critique was completed. Put simply, these cases do not address the issue presented in the Motion to Strike.

However, the cases cited by Applicant do stand for the proposition that even though survey evidence can be submitted in rebuttal, such evidence must deny, explain or discredit the information provided in the original report. *See Bridgestone, id.* at 2 (the TTAB held that the second survey and the testimony regarding that survey "are proper rebuttal to the extent that they bear on the validity and probative value of the first survey. ... We have not considered the second survey and the corresponding testimony for purposes of supporting opposers' case-in-chief on its claim of likelihood of confusion."); *AMBEV v. The Coca-Cola Company*, Opp. Nos. 91178953, et al. (TTAB 2012) (*citing Data Packaging Corp. v. Morning Star, Inc.*, 212 USPQ

109, 113 (TTAB 1981) (denying motion where the same expert offered one report that both critiqued the original report and offered a secondary meaning survey in rebuttal). The AMBEV decision, however, relies on *Data Packaging*. In *Data Packaging*, the Board recognized that admission of rebuttal evidence is not automatic, but requires broader analysis: "The fact that evidence might have been offered in chief does not preclude its admission as rebuttal. ***In such cases the trier of the facts has discretion to admit rebuttal testimony in the interest of fairness***." (emphasis added). 212 USPQ at 113.

For the reasons set forth in greater detail in the Motion to Strike, Opposers' position is that, in the interest of fairness and in light of the misrepresentations made to date, the Johnson "rebuttal" report should be stricken. It is a brand new report, and review on its face makes clear that it is not rebuttal, but case-in-chief, evidence. Where, as here, Applicant "hedged its bets" and waited to prepare an expert report until after the deadline when it was due and claimed it was "rebuttal" all the while knowing it was preparing a case-in-chief report, it is appropriate for the Board, in exercising its discretion, to determine the procedural issue of whether the report can be stricken for such misrepresentations from the outset.

To the extent the Board declines to rule on the Motion to Strike at this time, Opposers request that the discovery period be extended for a period of 30 days to enable the taking of Mr. Johnson's deposition, and that all deadlines extend accordingly.

Dated this 29th day of May, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by ordinary U.S. mail, postage prepaid, with a courtesy copy via email, on this 29th day of May, 2012, to Counsel for Applicant:

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